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Supreme Court of the United States.

OCTOBER TERM, 1974.

No. 74-1036.

HANS PEYMANN,
PETITIONER,
v.
PERINI CORPORATION,
RESPONDENT.

Respondent's Brief in Opposition to Petitioner's Petition for Writ of Certiorari and Brief in Support Thereof.

The respondent respectfully maintains that the petitioner's request that a writ of certiorari issue to the United States Court of Appeals for the First Circuit to review the judgment of that Court in the above-entitled action should be denied and in support thereof sets forth the following:

I.

Opinion Below.

In addition to the opinion of November 22, 1974 of the United States Court of Appeals for the First Circuit (Appendix A in the petitioner's brief), the respondent respectfully directs the Court's attention to the decision of said

Court of Appeals on December 24, 1974, which was in response to the petitioner's Petition for Rehearing (Appendix C in the petitioner's brief).

II.

Jurisdiction.

The respondent respectfully submits that the criteria for granting a writ of certiorari as set forth in Rule 19 of the Rules of the Supreme Court of the United States are not applicable to the decisions of the United States Court of Appeals for the First Circuit, in the instant case, set out as Appendices A and C in the petitioner's brief. Said decisions are not in conflict with the decision of another court of appeals on the same matter nor have said decisions conflicted with applicable decisions of this Court.

III.

Questions Presented.

The respondent does not agree that the questions presented are correctly stated in Section III of the petitioner's brief and submits that the questions should be:

A. Whether the United States Court of Appeals for the First Circuit was correct in affirming the doctrine that, whereas not every breach of duty will assign a seaman full responsibility for his injury, nevertheless a seaman may not recover where his breach of duty is the *sole* cause of his injury?

B. Whether the United States Court of Appeals for the First Circuit was correct in ruling that, on the basis of the pleadings filed in behalf of the petitioner and the concession by counsel for the petitioner that the same allegations were

relied upon to establish Jones Act negligence and unseaworthiness under general maritime law, it was appropriate for the trial court to submit the case to the jury under the second count for alleged unseaworthiness?

IV.

Statutes Involved.

The respondent at no time raised as an issue the doctrine of assumption of the risk and respectfully contends that the petitioner's assertion that this litigation involved the statute designated as 45 U.S.C. § 54 (1970) is incorrect.

V.

Statement of Facts.

Counsel for the respondent agrees with the first two paragraphs of the statement of facts in the petitioner's brief but respectfully submits that the remaining paragraphs do not accurately set forth the evidence germane to the issues involved. Therefore, the following statement of facts is respectfully submitted in lieu of the balance of the petitioner's statement.

On Wednesday, April 10, 1968, the tugboat "Gorham Whitney" was tied up to a dock undergoing repairs. The overhaul work was being performed in the engine room of the tugboat "Gorham Whitney" while it was at a dock in the employer's yard and while it was out of service.

The petitioner was the chief marine engineer in charge of the engine overhaul work being performed by him and Mr. Mahoney, the assistant engineer.

The petitioner, as the senior or chief marine engineer in charge of the engine room, the overhaul work and the equipment involved in the engine repair, admitted responsibility

for maintaining proper working conditions, and also admitted that it was his job to keep the railings, on which he was allegedly standing, clean of oil.

The petitioner further admitted that it was his duty and responsibility as chief engineer to see to it that the necessary tools and equipment for this engine room repair work were available and in safe working order and that the safety rail in the engine room was kept clean of oil.

The petitioner also admitted that he was the man in charge of the stepladder that should be in the engine room.

The petitioner's fellow employee, Mr. Mahoney, who was working with and under the supervision of the petitioner at the time of the alleged fall, stated that the petitioner was in charge of seeing (1) that the two of them had the necessary tools, equipment and appliances to do the repair work on April 10, 1968; (2) that the equipment they were going to use was available and in good condition; and (3) that the conditions under which they were going to work were safe.

Although there was no third man present in the engine room during the prolonged layover for overhaul, the evidence established that such a procedure was adopted only when there was a emergency at sea or a rush repair job in progress.

On or about April 10, 1968, the petitioner, instead of using a stepladder in the course of his work, allegedly climbed on a railing, which was installed as a safety grab rail in heavy seas, and while on this rail slipped and fell.

There was no evidence in this case as to how or when the alleged oil appeared on the railing and, in addition, the petitioner's fellow workman made it very clear that the rail was not to be used as a stepladder but was installed in the engine room to serve as a safety grab rail in rough seas.

Mr. Mahoney, who was put on the witness stand by the petitioner's attorney, stated he had no recollection of seeing the petitioner fall, although they were no more than two or three feet apart. In addition, this same fellow employee indicated that he had, on many occasions, performed the same type of repair work without assistance.

VI.

History of Proceedings.

The respondent does not agree with the second sentence in the last paragraph of this section of the petitioner's brief and respectfully submits that the decision of the United States Court of Appeals for the First Circuit on the petition for rehearing (Appendix C of the petitioner's brief) is strong support for the respondent's contention that the petitioner has incorrectly set out the questions involved in this controversy.

VII.

Considerations Governing Review on Certiorari.

The respondent, in Section II of this brief, indicated that it disagreed with the petitioner's argument that the discretionary power of the Court should be exercised in its favor. Counsel for the respondent maintains that a review of the language in the two decisions under consideration establishes that they do not come within the provisions of the criteria of Rule 19 of the Rules of the Supreme Court of the United States.

The mere fact that courts in various jurisdictions have or have not denied recovery to an injured seaman in situations alleged to be analagous to the factual situation in the case of *Walker* v. *Lykes Bros. S.S. Co.*, 193 F. 2d 772 (2d

Cir. 1952), does not prove that the decisions rendered by the United States Court of Appeals for the First Circuit are in conflict with decisions of other courts.

VIII.

Argument.

The respondent maintains that the contention of the petitioner that the "Walker Doctrine" is tantamount to a reassertion of the defense of assumption of the risk and therefore violative of 45 U.S.C. § 54 (1970) and case law construing said statute is without merit and offers in support of its position the language of Circuit Judge John Harlan in *Dixon* v. *United States,* 219 F. 2d 10 (2d Cir. 1955):

> "Cases such as *Walker* v. *Lykes Bros. S.S. Co.,* 2 Cir., 1952, 193 F. 2d 772 . . . and other cases of the same tenor which the appellant cites, *are in no way inconsistent with the rule that assumption of risk is not a defense* or comparable to the situation before us. Those cases are only instances of the *firmly established rule that an employee may not recover against his employer for injuries occasioned by his own neglect of some independent duty arising out of the employer-employee relationship.* Their result turns really not upon any question of 'proximate cause,' 'assumption of risk' or 'contributory negligence,' but rather upon the employer's independent right to recover against the employee for the nonperformance of a duty resulting in damage to the employer, which in effect offsets the employee's right to recover against the employer for failure to provide a safe place to work." (Emphasis supplied.) (219 F. 2d at 16-17.)

Inasmuch as the petitioner on page 25 of his brief agrees that it is a proper legal conclusion "to hold that a plaintiff is barred from recovery because his own negligence was the sole cause of injury," counsel for the respondent does not comprehend the petitioner's dissatisfaction with the charge by the trial judge that the respondent could not rely on any principle of assumption of the risk and had the burden of proving that the petitioner's injury was due wholly and solely to a failure on his part to perform the responsibilities assigned to him. (Pages 33 and 34 of petitioner's brief.)

The petitioner, in Section B of its "Argument" (Page 25 of Petitioner's brief), claimed that the United States Court of Appeals for the First Circuit erred in ruling that proof of unseaworthiness was a necessary element of the claim for negligence under the Jones Act. A review of the two decisions (Appendices A and C to petitioner's brief) clearly indicates that the petitioner's interpretation or description of the aforementioned ruling is incorrect. The trial court and the Court of Appeals for the First Circuit made a ruling and two decisions based on the factual situation in this matter. In this case the petitioner alleged and his counsel agreed that the evidence introduced sought recovery under either count I. (Jones Act) and/or count II. (general maritime law) for the same negligent acts. This factual situation, therefore, is not similar to those cases where the alleged negligence of the respondent is based on one set of charges and the unseaworthy condition is based on a different set of circumstances.

It is to be noted that the petitioner's counsel on page 27 of his brief states: "It is also settled that the same set of facts can constitute negligence as well as unseaworthiness."

In such a factual situation, the rulings by the trial court and the decisions by the United States Court of Appeals for the First Circuit cannot be held to be in error.

IX.

Conclusion.

Counsel for the respondent respectfully submits that the record in this litigation does not support the contention of the petitioner that the defense of assumption of the risk is being reinstated and the respondent's burden of proof of negligence under the Jones Act is being increased. Therefore, the respondent asks that the petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit be denied.

Respectfully submitted,

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